91-1574

Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1991

JOYCE PERKINS, PETITIONER

VS.

WESTERN SURETY COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CEOLA JAMES
P.O. BOX 1465
VICKSBURG, MS. 39180

(601) 636-2773

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Where a case is brought to federal district court on diversity jurisdiction of the person, was it error for the United States District Court to exercise subject matter jurisdiction over the issue of attorney fees while said issue was being reviewed by the Mississippi Supreme Court as to whether Western Surety Company acted in good faith in incurring attorney fees and billing its fees to the Petitioner, Joyce Perkins?

2. Is it proper for a federal court to make rulings contrary to the highest court of a state in which the federal court is sitting, where such rule involves substantive rules of state law?

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IN THE SUPREME COURT OF THE UNITED STATES

JOYCE PERKINS PETITIONER

VS. NO. _____

WESTERN SURETY COMPANY RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

COMES NOW, the Petitioner, Joyce Perkins, by and through her Attorney, Ceola James, and files this her Petition for a Writ of Certiorari, and Petitioner would set out the following matters in support thereof:

I.

QUESTIONS PRESENTED FOR REVIEW: (i) Where a case is brought to federal district court on diversity jurisdiction of the person, was it error for the United States District Court to exercise subject matter jurisdiction over the issue of attorney fees while said issue was being reviewed by the Mississippi Supreme Court as to whether Western Surety Company acted in good faith in incurring attorney fees and billing its

fees to the Petitioner, Joyce Perkins?

(2) Is it proper for a federal court to make rulings contrary to the highest court of a state in which the federal court is sitting, where such rule involves substantive rules of state law?

II.

STATEMENT OF JURISDICTION: (1) An Order was entered in this cause on the first day of October, 1991. An Order denying the Petition for a Rehearing was entered on the thirteenth (13th) day of November, 1991. See the Appendix for the opinions of the Courts rendered prior to this Petition.

THE BASIS FOR FEDERAL JURISDICTION which was asserted by Western Surety Company when it sued the Petitioner in the federal district court was based on diversity of citizenship, 28 U.S.C. Section 1332, since the parties were citizens of different states, and the matter in controversy exceeded $10,000.00. Petitioner had no objection to federal jurisdiction of the person, but the Petitioner has made a continuous objection to subject matter jurisdiction exercised by the lower Courts.

III.

CONSTITUTIONAL PROVISIONS: In federal Courts, except in matters governed

by Federal Constitution or by acts of Congress. the law to be applied in any case is the law of the state. 28 U.S.C. Section 725.

IV.

STATEMENT OF THE CASE: The Petitioner invokes the jurisdiction of the Supreme Court of the United States that are based on the following grounds:

1. The United States Court for the Southern District of Mississippi, Western Division, has rendered a decision, and the United States Court of Appeals for the Fifth Circuit has affirmed a decision which conflicts with a decision made by the Supreme Court of the State of Mississippi, which is a state Court of last resort. This decision was also made on the same parties that are before this Court. See Perkins v. Thompkins, 551 So. 2d 204, 210, (Miss 1989).

2. The decision sought to be reviewed by the Petitioner also conflicts with other

land mark federal court decisions which prohibit federal courts from making state law by forum shopping in federal Court based on diversity of citixenship. See Erie V. Tompkins, 58 S. Ct. 817 (1938), and Hanna v. Plumber, 85 S. Ct. 1136 (1965).

3. The decision sought to be reviewed by the Petitioner has sanctioned such a departure by the lower court, so as to merit a call for an exercise of this Court's power of supervision.

This case originated in the Chancery Court of Warren County, Mississippi. This case involves the contest of an estate based on a 1983 Mississippi Statute which allows an illegitimate child to inherit from its father.

Joyce Perkins asserted her claim as the natural daughter of Robert Taylor, the deceased. Western Surety Company was the bonding company for the administratrix, Joyce Perkins, who is the Petitioner in this case.

This estate is being contested by the aunts and uncle of Robert Taylor, the deceased. The case is on appeal for the second time to the Mississippi Supreme Court. Oral argument was had on August 15, 1991.

The attorney fees awarded to Western Surety Company by the Chancery Court was vacated by the Mississippi Supreme Court during the first appeal, and was remanded for the lower Court or Chancery court to consider whether Western Surety Company acted in good faith by participating throughout the entire case, and billing its fees to the Petitioner, Joyce Perkins.

On remand, the Chancery Court of Warren County again awarded excessive attorney fees to Western Surety Company. This case was appealed for the second time to the Mississippi Supreme Court. The Petitioner is contending that Western Surety Company is attempting to circumvent the jurisdiction of the Mississippi Supreme Court by filing for attorney fees in the United States

District Court while the reasonableness and necessity of its fees are being reviewed by the Mississippi Supreme Court

The multiple litigation filed by Western Surety Company was vexatious to the Petitioner, and it created a hardship for the Petitioner to litigate multiple claims on the same set of facts.

The record will show that the Petitioner paid money into the registry of the Chancery court that the Court had disbursed to her to prevent Western Surety Company from being exposed to any liability, but Western Surety Company sent its attorney to sit in on the case and billed its attorney fees to the Petitioner, despite the fact that the Petitioner had hired several attorneys to participate in the case at various stages since her attorney was a sole Petitioner.

Western Surety Company should not be allowed to prevail on a $75,432.47 judgement in federal court that would not be upheld in state Court. Western Surety Company

should not be allowed to circumvent state law by filing a suit based on diversity in order to forum shop for a different ruling. The failure of the federal district court to follow state law by requiring Western Surety Company to act in good faith in incurring attorney fees would cause Western Surety Company to choose federal Court in order to avoid the requirement of good faith action or performance. This case is of great public importance because it will cause surety companies to be viewed in a different manner if the Court will uphold the duplication of services by the surety company that insists on having its attorney sit throughout the contest of an estate and bill its fees to the principal. It will defeat the purpose of having an estate if the surety company is allowed to absorb all of the fees of the estate and to obtain excessive judgements against the beneficiary or administratrix of an estate.

The United States District Court interfered with the subject matter jurisdiction of the Mississippi Supreme Court when it ruled for Western Surety Company on the issue of attorney fees while at the same time the issue of whether Western Surety Company acted in good faith was and is pending in the Mississippi Supreme Court. The United States District Court did not inquire into the good faith actions of Western Surety Company, but it made its ruling as a matter of law by granting a preemptory ininstruction.

The federal court, in exercising subject matter jurisdiction, failed to realize that the Mississippi Supreme Court was enterentertaining a **rule making decision** on what constitutes good faith actions in the case on appeal. In federal court, the law to be applied is the law of the state in which the federal court is sitting. There is no federal common law, and congress has no power to

declare substantive rules of common law. The phrase, "laws of the several states," is held to include not only state statutory laws, but also the state decisions on questions of general law. These rules of law were announced in the case of Erie V. Tompkins, 58 S. Ct. 817.

In interpreting good faith actions, all facts must be before the Court. If all of the facts are not before the Court, the Court cannot rule, as a matter of law, that Western Surety Company acted in good faith. The fact that the contract was valid on its face, and the fact that diversity of citizenship existed is immaterial. In the case of Perkins v. Thompson, 551 So. 2d 204, 210, (Miss 1989), the Mississippi Supreme Court had already vacated the award of attorney fees in the amount of $39, 155.65, as it questioned whether the fees were reasonable and necessary, On remand, the lower Court cut the fee to $35,000.00. The

fee of $35,000.00 is still being reviewed by the Missisippi Supreme Court. In the first decision, the Mississippi Supreme Court ruled that idemnity contracts must be performed in good faith. While the Mississippi Supreme Court is pondering a **rule making decision on the good faith performance of Western Surety Company** in the performance of its idemnity agreement with the principal, Joyce Perkins, the Court can see the interference with both the **rule making power** and **subject matter jurisdiction** of the Mississippi Supreme Court when Western Surety Company goes into federal district court based on diversity of citizenship, and sues the Petitoner for an additional $75,032.47 which it charged in litigating the second appeal of the case. This amount was double the amount that is now on appeal.

The Mississippi Supreme Court is a regularly constituted court, and every regularly constituted court has power to do all

things reasonable necessary for the administration of justice within the scope of its jurisdiction, and for the enforcement of its judgements and mandates. 21 C.J.S. Courts, Section 88. The exercise of subject matter jurisdiction by the United States District Court interfered with the first order or mandate of the Mississippi Supreme Court, since it had already been ruled that Western Surety Company should act in good faith in incurring its fees. By requesting fees more excessive than the fees that had first been vacated by the Mississippi Supreme Court, Western Surety Company set up a clear case of forum shopping, based on diversity jurisdiction, in order to obtain a different result in federal Court that could not have been obtained in the Mississippi Supreme Court. The actions of Western Surety Company were also designed to take the **rule making power** from the Mississippi Supreme Court which is the power to **declare its rules of**

substantive law.

Respectfully submitted,

CEOLA JAMES
ATTORNEY FOR PETITIONER

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

WESTERN SURETY COMPANY PLAINTIFF

VS. NO. W88-0046-B

JOYCE PERKINS DEFENDANT

JUDGMENT

THIS CAUSE, having come on for trial on the 12th day of December, 1990, said parties having announced ready for trial, and evidence having been presented in open court on December 12 and 13, 1990, before a jury consisting of Robert Buttress, and five other good and lawful citizens of the Southern District of Mississippi, Vicksburg Division, and the Defendant having voluntarily dismissed with prejudice her counterclaim for abuse of process during the proceedings, and said jury having heard evidence, and having been instructed under the law by the Court and having

rendered the following verdict:

> "We, the jury, find for the Plaintiff, Western Surety Company, and against the Defendant, Joyce Perkins, in the amount of $75,032.47 ..."

IT IS THEREFORE ORDERED AND ADJUDGED that all counterclaims filed in this matter should be and hereby are dismissed with prejudice and further that the Plaintiff, Western Surety Company, do have and recover the sum of $75, 32.47 from Defendant, Joyce Perkins, together with interest at the rate of 7.02 % from this date, as well as any and all court costs.

ORDERED AND ADJUDGED this the 20 th day of December, 1990.

WILLIAM H. BARBOUR (S)*

CHIEF JUDGE

* NO PETITION FOR REHEARING WAS FILED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1025

WESTERN SURETY COMPANY — PLAINTIFF-APPELLEE

VS.

JOYCE PERKINS — DEFENDANT-APPELLANT

Appeal from the United States Court for the Southern District of Mississippi
(CA-W-88-0046 (B)

Before: Jolly, Davis, and Smith, Circuit Judges.

PER CURIAM:*

Western Surety Company brought suit in district court seeking reimbursement of attorneys' fees pursuant to an idemnity agreement contained in an administratrix

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that local rule, the Court has determined that this decision should not be published.

bond in which Perkins was the Principal. The jury awarded $75,032.47 to the Plaintiff. Defendant now appeals this verdict.

On appeal, Defendant argues that the District Court intrfered with the jurisdiction of the Mississippi courts, because there is a case pending in state court in which Defendant is appealing an award of attorneys' fees and expenses awarded to the Plaintiff. The Defendant also contends that the district court improperly gave the jury a preemptory instruction. Defendant claims that there is no statutory authority for granting attorneys' fees to a loosing party. and that that granting the fees before the case in state court is decided would be premature.

We affirm the district court's judgement. The district court has subject matter jurisdiction and personal jurisdiction.[1] A

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[1]The district Court had subject matter jurisdiction pursuant to 28 U.S.C. Section 1332, diversity jurisdiction. Jojce Perkins

separate case pending in the Mississippi Supreme Court did not bar the district Court from hearing the case.

The case now pending in the Mississippi Supreme Court involves an appeal by Perkins of the Chancery Court's Order awarding the Defendant $35,000.00.[2] The award was for the attorney's fees incurred by Western Surety Company through September 30, 1987. The suit brought by Western Surety in district court was for attorneys' fees incurred after October 1, 1987. Because the cases involved attorneys fees incurred during two different time periods, the issues of whether they were reasonable and

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is a resident of North Carolina, The matter in controversy exceeds $10.000.00. The district court had personal jurisdiction jurisdiction pursuant to the contracts branch of the Mississippi Long Arm Statute contained in Miss. Code 1972, Section ;3-3-57. Western Surety Company is qualified to do business in Mississippi, and Perkins entered into a contract to be performed in whole or in part in Mississippi.

[2]The Chancery Court originally awarded Western Surety Company $39,155.65

necessary are different. The district court did not interfere with the jurisdiction of the Mississippi courts by hearing a case that involved attorneys' fees and expenses for a different period of time than those being litigated in state court.

The district court properly gave the jury a preemptory instruction on liability, requiring it to find for Western Surety, submitting to the jury only the determination of reasonable and necessary attorneys' fees and expenses. Perkins never questioned the

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for reasonable and necessary attorneys' fees it incurred through September 30, 1987. Perkins appealed this Order to the Mississippi Supreme Court. The Mississippi Supreme Court vacated the Order, and remanded the case to the Chancery Court in order for it to determine "whether it was necessary for Western Surety Company to employ separate counsel to protect its interest, whether the surety acted in good faith in incurring those expenses with its principle, and lastly, whether the fees and expenses claimed were reasonable in amount." Perkins v. Thompson, 551 So. 2d 204, 210 (Miss 1989). On remand, the state trial Court found that the expenes were necesary and reasonable, snd it awarded the Plaintiff $35, 000.00. The appeal of the second Order is now pending before the Mississippi Supreme Court.

validity of the idemnity provision in the contract. The award of attorneys' fees is not based on any statutory authority, and does not depend on the outcome of the case now on appeal in the Mississppi Supreme Court.

For the reasons stated above, the Order of the district court is

A F F I R M E D.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1025

WESTERN SURETY COMPANY — PLAINTIFF-APPELLEE

VS.

JOYCE PERKINS — DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR REHEARING

(November 13, 1991)

BEFORE: JOLLY, DAVIS, AND SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is hereby DENIED.

ENTERED FOR THE COURT:

(s).JOLLY
UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, Ceola James, do hereby certify that I have this day mailed, postage prepaid, by first class mail, three (3) true and correct copies of the above and foregoing Petition for a Writ of Certiorari to: Hon: Calvin L. Wells, P.O. Box 1970, Jackson, MS 39215-1970.

THIS THE 11th DAY of February, 1922.

Ceola James

CEOLA JAMES
ATTORNEY FOR PETITIONER

Supreme Court, U.S.
FILED
APR 23 1992
OFFICE OF THE CLERK

(2)

No. 91-1574

In The

Supreme Court of the United States

October Term, 1991

JOYCE PERKINS,

Petitioner,

vs.

WESTERN SURETY COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JEFFREY P. HUBBARD
(Counsel of Record)
CALVIN L. WELLS
KATHARINE C. MALLEY
WELLS, MOORE, SIMMONS & NEELD
Post Office Box 1970
Jackson, Mississippi 39215-1970
(601) 354-5400

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit interfered with the jurisdiction of the Mississippi Supreme Court when it affirmed the decision of the United States District Court for the Southern District of Mississippi against Joyce Perkins and in favor of Western Surety Company.

2. Whether the Court of Appeals properly applied Mississippi law when affirming the District Court's judgment in favor of Western Surety Company.

PARTIES TO THE PROCEEDING BELOW

The parties in the Court below were:

Appellant: Joyce Perkins

Appellee: Western Surety Company, a South Dakota Corporation with its principal place of business in Sioux Falls, South Dakota. The parent corporation of Western Surety Company is Surewest Financial Corporation. Western Surety has no non-wholly owned subsidiaries.

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No. 91-1574

In The

Supreme Court of the United States

October Term, 1991

JOYCE PERKINS,

Petitioner,

vs.

WESTERN SURETY COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW, JURISDICTION, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Opinions Below, Jurisdiction and Statutory and Regulatory Provisions involved are correctly set forth in the Petition.

STATEMENT OF THE CASE

On August 6, 1985, the Chancery Court of Warren County, Mississippi, appointed Joyce Perkins as administratrix of the Estate of Robert Taylor, Deceased, and required a $200,000.00 administratrix bond. On that same

date, Joyce Perkins as principal entered into an application for bond with Western Surety in the penal sum of $200,000.00. Contained within the bond application was an indemnity agreement which expressly states as follows:

> The undersigned hereby certify the truth of all statements in the application, and jointly and severally agree:
>
> * * *
>
> (ii) to completely indemnify the Company (Western Surety) from and against any liability, loss, costs, attorneys fees and expenses whatsoever which the Company shall at any time sustain as surety or by reason of having been surety on this bond or any other bond issued for applicant or for the enforcement of this agreement.

On September 10, 1986, a relative of the deceased was allowed to intervene and to file a Complaint against Joyce Perkins, individually and as administratrix under the bond, as well as Western Surety as the administratrix's surety. On the same day, Western Surety filed a cross-claim against Joyce Perkins individually seeking reimbursement for attorney's fees and expenses incurred in its defense of its interest as surety under the administratrix bond.

On November 12, 1987, the Chancery Court of Warren County, Mississippi, awarded Western Surety a judgment against Joyce Perkins in the amount of $39,155.65 for reasonable and necessary attorney's fees and expenses which it incurred and paid through September 30, 1987.

On October 28, 1987, Joyce Perkins appealed the Warren County judgment to the Mississippi Supreme Court. This appeal was made prior to the entry of final judgment. On November 5, 1987, Joyce Perkins filed a Petition for Stay on the Collection Proceedings pursuant to the judgment entered in favor of Western Surety. On November 12, 1987, the final judgment was entered in favor of Western Surety; and additionally, supersedeas bond was set at $125,000.00. Joyce Perkins filed an Emergency Motion to Review the bond; however, the Mississippi Supreme Court affirmed the amount of the bond on December 10, 1987.

Joyce Perkins procured and attempted to submit an appeal bond which failed to meet the statutory requirements. Therefore, Western Surety began collection proceedings by filing a Suggestion for Writ of Garnishment on December 21, 1987.

On December 22, 1987, Joyce Perkins filed an Emergency Motion to Quash the Writ of Garnishment which the Mississippi Supreme Court, by Order dated December 23, 1987, remanded to the Warren County Chancery Court for determination. Shortly thereafter, Joyce Perkins filed a Motion for Leave to Amend the Bond and Western Surety filed a Motion to Quash the Purported Bond. After a hearing on January 5, 1988, the Warren County Chancery Court entered its order denying the Motion to Amend and granting Western Surety's Motion to Quash the Purported Bond.

Next, on January 12, 1988, Joyce Perkins returned to the Mississippi Supreme Court and filed an Emergency Petition to Quash Writs of Garnishment and Attachments,

to Dismiss Civil Suit and Other Relief. On January 20, 1988 the Supreme Court denied the emergency relief sought by Joyce Perkins. On that very same day, Joyce Perkins filed suit in the United States District Court for the Southern District of Mississippi seeking extraordinary relief in the from of a temporary restraining order to stop the garnishment and to grant her relief from having to post the $125,000 bond. This request for relief was also denied.

On January 26, 1988, Joyce Perkins filed another appeal bond in yet another attempt to satisfy the statute and court order. On January 29, 1988, Joyce Perkins filed a Petition with the Mississippi Supreme Court for Re-Hearing on the Emergency Motion to Quash Writs of Garnishment, Dismiss Civil Suit and Other Relief. On February 25, 1988, the Supreme Court again remanded the issue to the Warren County Chancery Court for further hearing on the bond. On March 8, 1988, the Warren County Chancery Court entered an order which found that the second bond filed by Joyce Perkins was also invalid. Thereafter, on or about March 17, 1988, Joyce Perkins filed a Petition for Re-Hearing in the Chancery Court of Warren County, Mississippi. On May 6, 1988, the Warren County Chancery Court entered an order denying the Petition for Re-Hearing. On May 13, 1988, Joyce Perkins filed her Notice of Appeal of the Chancery Court Order to the Mississippi Supreme Court.

In the meantime, on August 2, 1988, the Warren County Chancery Court entered an order closing the Estate of Robert Taylor, Deceased and approving the distribution of assets. Immediately thereafter, on August 4, 1988, Joyce Perkins filed a Supplemental Notice of

Appeal of Separate Order Taken Under Advisement To Close Estate While Contested Supersedeas Bond is on Appeal. On August 8, 1988, Joyce Perkins filed another Emergency Motion to Grant Stay of Execution Pending the Review of the Contested Supersedeas Bond. On August 10, 1988, the Mississippi Supreme Court entered an order agreeing to have an expedited hearing on the bond and staying the order allowing the estate assets to be distributed. On October 14, 1988, the Supreme Court issued an order to the Warren County Chancery Court staying the distribution of the estate's assets until December 15, 1988. On December 21, 1988, the Supreme Court of Mississippi entered a further stay until January 16, 1989 which was further extended to February 15, 1989.

On March 8, 1989, the Mississippi Supreme Court once again remanded for further hearing the consideration on the bond to the Warren County Chancery Court. On March 23, 1989, the Warren County Chancellor, rather than lowering the previously established $125,000 bond, raised the bond to the amount of $126,260.68.

On April 12, 1989, Joyce Perkins filed an Amended Appeal Bond to the Supreme Court. On April 26, 1989, the Warren County Chancery Court again reviewed the Amended Appeal Bond and determined that it was insufficient and did not constitute a valid and sufficient supersedeas bond. Immediately thereafter, on April 26, Joyce Perkins filed a Petition for Writ of Mandamus. Additionally, on April 28, 1989, Joyce Perkins filed in the Chancery Court of Warren County, Mississippi a Motion for a Stay Pending the Review of the Contested Supersedeas Bond. On that same day, the Chancery Court of

Warren County, Mississippi denied Joyce Perkins' request for a further stay.

On May 31, 1989, Joyce Perkins filed a Petition for Re-Hearing on Petition for Writ of Mandamus and Stay Under Rule 8(d), which was dismissed as moot on August 8, 1989, because, on that same day, the Mississippi Supreme Court rendered its opinion on the original appeal from the Warren County Chancery Court. The Supreme Court held that the trial court made a mistake in interpreting the statutes regarding whether Joyce Perkins was entitled to inherit from the Estate of Robert Taylor, and remanded the case to the chancellor to apply the correct law. The Supreme Court also remanded the issue of whether Western Surety acted in good faith in hiring its own counsel, and whether the attorneys' fees were reasonable and necessary under the circumstances. On February 27, 1990, by order of the Warren County Chancery Court, the court, after applying the correct statutes, again entered a judgment finding that Joyce Perkins was not entitled to inherit from the Estate of Mr. Robert Taylor, and more importantly, further found that it was necessary for Western Surety to hire separate counsel, and that Western Surety acted reasonably and in good faith in employing separate counsel, and again awarded attorneys' fees to Western Surety, this time in the amount of $35,000.

Next, on March 6, 1990, Joyce Perkins filed a Petition for Re-Hearing in the Chancery Court for reconsideration of its February 27th order. On April 4, 1990, the Chancellor denied the petition. Immediately thereafter, on April 11, 1990, Joyce Perkins filed her Notice of Appeal of the Chancellor's April 4th Order. On May 15, 1990, Joyce

Perkins filed an Appeal Bond with the Mississippi Supreme Court with Supersedeas in the amount of $94,000 for the appeal. This appeal, regarding the second Warren County Chancery Court order is now pending before the Mississippi Supreme Court.

On April 5, 1988, Western Surety filed the case *sub judice* in Federal District Court seeking reimbursement for its attorneys' fees incurred *after* October 1, 1987. Due to the numerous pleadings and cases filed by Joyce Perkins after the initial Complaint was filed, the amount of fees had to be amended. The attorneys' fees requested by Western Surety in the action filed in the United States District Court for the Southern District of Mississippi were incurred during the time frames of October 1, 1987, through August 28, 1990. These fees are neither duplicative or interrelated to the fees requested in the case currently pending in the Mississippi Supreme Court.

On December 20, 1990, the United States District Court for the Southern District of Mississippi awarded Western Surety $75,432.47 in attorneys' fees. Petition, Appendix, p. 16. In affirming the District Court, the Court of Appeals correctly found that the District Court did not interfere with the jurisdiction of the Mississippi Supreme Court. Petition, Appendix, pp. 18-20.

Petitioner has represented to this Court that the decisions of both the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit directly conflict with a decision of the Mississippi Supreme Court. Moreover, Petitioner asserts that the Court of Appeals interfered with the jurisdiction of the Mississippi Supreme

Court. No conflict or usurpation of power exists since the subject matter of the federal court litigation was separate and distinct from the subject matter of the case pending in the Mississippi Supreme Court. The issue of attorneys' fees incurred from October 1, 1987 until August 28, 1990, has never been presented to the Mississippi Supreme Court. In addition, the Court of Appeals properly applied Mississippi law regarding the necessity and reasonableness of the attorneys' fees.

ARGUMENT

This case does not present any federal or state constitutional or statutory questions nor does it present any question upon which there is a conflict in the Courts of Appeals or the District Courts. In addition, this case does not present an important issue of federal law nor does it present a conflict between a decision of the Court of Appeals and the Mississippi Supreme Court regarding a general, non-federal matter.

Petitioner asserts that she is entitled to invoke the jurisdiction of the United States Supreme Court because of a conflict between the Court of Appeals ruling and a decision of the Mississippi Supreme Court. Petitioner's assertion is simply incorrect, because no conflict exists. The case currently before the Mississippi Supreme Court involves a different subject matter from the case before the District Court and the Court of Appeals because the federal case dealt with separate and distinct attorneys' fees incurred in a wholly different time frame than the state court case. As such, there should be no dispute that

the District Court had both subject matter and personal jurisdiction over the parties before it. In any event, it is well established that two concurrent *in personam* actions existing between the same parties and dealing with the same subject matter may proceed concurrently in both the state forum and the federal forum. *Moses H. Cone Memorial Hospital v. Mercury Constr.*, 460 U.S. 1 (1983). In its Opinion affirming the ruling of the District Court, the Court of Appeals recognized that a similar case was pending in the Mississippi Supreme Court, and ruled that the District Court did not interfere with the jurisdiction of the Mississippi Supreme Court. Petition, Appendix, pp. 18-20.

Petitioner also attempts to assert that the decision of the Court of Appeals conflicts with federal court decisions regarding forum shopping. This assertion ignores the clear law in Mississippi that the pendency of a state court action does not preclude the federal court from considering the same matter. *Rippy v. Crescent City Commodities*, 710 F. Supp. 1074, 1080 (S.D. Miss. 1988). In addition, where both personal and subject matter jurisdiction exists, federal courts are obliged to hear cases properly within their jurisdiction even though there may be a pending state court case. *Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191 (5th Cir. 1988).

In the case *sub judice*, two separate lawsuits were filed, each admittedly seeking attorney's fees pursuant to the same Indemnity Agreement. However, as previously mentioned, the time frame for which the fees are sought and the services rendered in order to produce the fees are totally separate and independent. Pursuant to 28 U.S.C. § 1332, the District Court properly invoked diversity

jurisdiction over the federal court lawsuit as both the Plaintiff and Defendant were citizens from different states and the matter in controversy exceeded $10,000.00.[1] Petition, Appendix, p. 18. As such, the Petitioner's claim that the present case in federal court interfered with the jurisdiction of the state court lawsuit is incorrect and must fail.

In addition, the Court of Appeals determined that the award of attorney's fees in this case was not dependent on a ruling in the case pending before the Mississippi Supreme Court. Petition, Appendix, pp. 18-19. Moreover, an independent determination of the reasonableness and necessity of the attorneys' fees awarded was made by the District Court in accordance with Mississippi law, and affirmed by the Court of Appeals. Petition, Appendix, pp. 19-20. There has been no misapplication of or refusal to follow, a state court decision. It has long been settled that situations such as this are not appropriate for review on certiorari by this Court. *Huddleston v. Dwyer*, 322 U.S. 332, 337 (1944); *Francis v. Southern Pacific Co.*, 333 U.S. 445, 447 (1948); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674 (1949).

Petitioner finally asserts that this case is of great public importance "because it will cause surety companies to be viewed in a different manner if the court will uphold the duplication of services by the surety company that insists on having its attorneys sit throughout the contest of an estate and bill its fees to the principal."

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[1] The Complaint in this matter was filed prior to the amendment of 28 U.S.C. § 1332 requiring the matter in controversy to exceed $50,000.00.

Petition, p. 8. Respondent strongly disagrees with this statement and further submits that there is no issue of importance to the public as a whole presented in this case.

However, it must be pointed out that the majority of the attorneys' fees awarded by the District Court and Court of Appeals were created by the numerous pleadings, motions and petitions filed by the Petitioner. Therefore, a more accurate statement of the issue would be that a surety who is required to defend excessive, and in many instances duplicative pleadings filed by a principal on a bond, should expect to receive, and should receive, indemnification from that principal as clearly set forth in the parties' contract. Any other ruling would result in the cost of bonds skyrocketing.

Because this case presents no issue of significant public importance, certiorari should not be granted. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955).

CONCLUSION

This case does not present a federal or state constitutional or statutory question nor does it present a question on which there is a conflict in the Court of Appeals or the District Courts. Moreover, there exists no important question of federal law which this Court should now settle. In addition, this case does not present a conflict between a decision of the Court of Appeals and of the Mississippi

Supreme Court on a general, non-federal matter. Respondent respectfully submits that the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

JEFFREY P. HUBBARD
(Counsel of Record)
CALVIN L. WELLS
KATHARINE C. MALLEY
WELLS, MOORE, SIMMONS & NEELD
1300 Deposit
Guaranty Plaza
Post Office Box 1970
Jackson, Mississippi 39215-1970
(601) 354-5400

Counsel for Respondent